Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

VICKI STEINER, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petitioner, a veteran employee with the United States Postal Service (the "Employer"), originally filed a charge of sexual discrimination against the Employer with the Equal Employment Opportunity (EEO). As a direct result of her complaint with the EEO, the Petitioner was then subjected to multiple retaliatory actions by her supervisory, including posting and filling her permanent bid position, denying her advanced sick leave, and changing policies concerning her sick leave (which was different than the rest of the employees). Since the EEO failed to complete a formal investigation ordered by the Office of Federal Operations and the Respondent failed to internally address the issues, the Petitioner filed a civil action in the District Court claiming retaliation for engaging in protected activity pursuant to 42 U.S.C. §2000e-3.

The Petitioner was denied her due process rights two times – the first when the EEO failed to investigate and render a decision regarding the Petitioner's complaint. The second time occurred when the District Court denied her right to a jury trial when she met her burden of proof for retaliation. The lower courts deviated from other circuits and imposed an unduly burden upon the Petitioner to prove the elements of adverse action and causation.

I. Whether the District Court of Ohio and the Circuit Court of Appeals for the Sixth Circuit erred in imposing an empermissible burden for retaliation pursuant to the statute that is contrary to other courts and dismissing the Petitioner's Complaint thereby violating the Petitioner's right of a Jury Trial and her due process rights under the Constitution?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit dated January 31, 2005 affirming the United States District Court for the Northern District of Ohio, Eastern Division's Decision granting the Respondent's Motion for Summary Judgment, which decision is set forth in the Appendix, p. 1a. The Decision of the United States District Court for the Northern District of Ohio, Eastern Division dated August 28, 2003 is set forth in the Appendix, p. 13a.

JURISDICTIONAL STATEMENT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the Northern District of Ohio, Eastern Division's decision granting the Respondent's Motion for Summary Judgment. This Petition is timely filed within the prescribed ninety-day period.

RELEVANT PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in

any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISIONS

42 U.S.C. Section 1983, Civil Rights

Section 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected,...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. Section 2000e-2:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq.

42 U.S.C. Section 2000e provides:

Section 2000e. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color.

STATEMENT

This is an action arising out of Vicki Steiner's, the Petitioner, employment with the Respondent, the United States Postal Service. The Petitioner was a diligent twenty-three year veteran at the Canton, Ohio Plant of the Respondent. However, the internal grievance process failed and the Respondent refused to comply with office policy and procedures.

The Petitioner commenced her employment with the Respondent in 1979. She was repeatedly awarded and promoted for her work. The Petitioner was never disciplined or warned for any problems. Given her impeccable record, in 1997, the Petitioner bid for and was awarded the vacant position of Manager Distribution Operations (hereinafter "MDO") for the Tour 3 shift, the afternoon shift. It was a supervisory position at Level 20.

The MDO work week was Monday through Friday, non-scheduled days being Saturday and Sunday.

MDOs were mid-level managers having the responsibility to manage supervisors and employees who processed mail in the plant. In April of 1998, Judson Zernechel arrived at the Canton Plant as the Plant Manager. Within one month of his arrival, he instructed the Petitioner to work on the first of many work details outside of her permanent bid job, which details lasted for approximately three years. Further, Zernechel announced to third parties that he did not like the Petitioner, blamed her for any problems at the plant, and mock and mimic the Petitioner to other managers when she was not present. Contrary to Zernechel's comments, the Petitioner never received a complaint about her performance.

In September of 2000, Zernechel ordered the Petitioner to return to the Canton Plant due to a shortage. There were material disputed facts as to the actual purpose of terminating her detail assignments. Zernechel stated that he was retiring and needed to prepare the plant for an incoming plant manager and reduce a cost factor of details. However, other personnel at the Canton plant were ready to testify that Zernechel wanted to cancel the Petitioner's detail so that he could commence her firing process.

However, rather than returning the Petitioner to her bid position, Zernechel assigned her to Tour 1, that was, the midnight shift. Moreover, Zernechel altered the MDO position to require the Petitioner to work weekends, with Tuesdays and Wednesdays as non-scheduled days. This was an unprecedented manager work schedule in the Petitioner's twenty-three year history at the Canton Plant. Zernechel's acts were in violation of the postal supervisory employees association rules, including once a position is awarded to an employee, it is considered her bid position, and thus, the Petitioner's tour should not have been changed; even

when an employee is assigned a detail, the bid job is held open; and the bid job could not be changed without the permission of the employee.

Also, Zernechel initiated an illegal personnel action by designating the Petitioner as an "MDO In Training," a position that did not exist within the Respondent's organization.[1] Simultaneously, Zernechel gave a similarly situated male employee, Al Restivo, the Petitioner's original bid job; he was not designated as "MDO In Training", although he had also been on temporary work details. Restivo's work schedule was not altered. Both of these wrongful job actions were posted plant wide on October 4, 2000 by Zernechel's order. Moreover, several other male employees that had been detailed as the Tour 3 MDO were also not given an "in training" designation like the Petitioner.

The Petitioner never received Form 50 from the Respondent which would have signified a change in employment status, including a change of tour duty, hours of work and non-scheduled days.

As a manager, the Petitioner had received extensive training with the Respondent regarding complaints of discrimination. Accordingly, the Petitioner first attempted to discuss her complaint with her immediate supervisor Zernechel, but to no avail.

Even though the Petitioner immediately objected to Zernechel's deviation from the well-established policy and procedure and attempted to correspond with management, her efforts were to no avail. Upper management informed her to resolve the dispute with Zernechel, the source of the problem. The local NAPS

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[1] In fact, the "in-training" status often symbolized the beginning of a disciplinary process.

president also registered an objection with Zernechel to the breach of policy, however, his complaint remained unanswered.

Following internal policy and the appropriate chain of command, the Petitioner contacted Frank Neri, Zernechel's immediate supervisor, requesting a meeting to address and resolve the illegal actions taken against her. Without any investigation or interview with the Petitioner, Neri instructed her to contact Zernechel, the alleged discriminator, regarding her complaints.

Neri's failure to follow the Respondent's policy caused the Petitioner to appeal in writing to the District Manager Jordan Small. Once again, the District Manager Jordan Small failed to investigate or intervene, advising the Petitioner that he had returned her complaint to Neri. After nineteen days, Neri responded to the Petitioner, instructing her to again meet with Zernechel, the man who had initiated the illegal job actions.

Only when it became apparent that none of the Respondent's managers intended to follow its own policy, the Petitioner contacted the Equal Employment Opportunity ("EEO") on January 9, 2001 for pre-complaint counseling. The Petitioner then filed a complaint alleging sexual discrimination on February 7, 2001. The complaint was dismissed as untimely on March 15, 2001. According, the Petitioner filed an action on May 3, 2001 against the Respondent alleging a claim of gender discrimination pursuant to 42 U.S.C. § 2000e-5 and 42 U.S.C. § 2000e-16 in the United States District Court for the Northern District of Ohio.

Within a few weeks of being served with the May 2001 lawsuit, Zernechel issued three certified letters to Petitioner within a forty-eight hour period. First, Zernechel unilaterally changed the way in which he agreed to accept medical documentation from the

Petitioner regarding her leave of absence. After being on notice of the lawsuit, he objected to her documentation as being unacceptable with no explanation. Second, he advised her that her permanent bid position as MDO T-3 was vacant due to the retirement of Mr. Restivo. On June 22, 2001, the position was posted as vacant. Zernechel told the Petitioner that she could apply for the position, but that she had to be re-trained even though she had significant detail experience and had worked for the Respondent for over twenty years.

NAPS representative once again protested that the Respondent was violating policy by posting the Petitioner's Tour 3 position. However, once again, the Respondent ignored his objections.

Third, Zernechel informed the Petitioner that her sick leave was due to expire and that she would be considered on leave without pay. He refused to grant the Petitioner advance sick leave resulting in her loss of benefits.

As a result of these actions, the Petitioner once again filed a complaint alleging retaliation against the Respondent with the EEO. Since the Petitioner failed to receive any notice of action or relief from the EEO, on April 15, 2002, the Petitioner filed a Complaint with Jury Demand in the United States District Court Northern District of Ohio. The Respondent filed a Motion for Summary Judgment on July 7, 2003, asserting that the Petitioner's Complaint failed to state a cause of action upon which relief could be granted. The Petitioner timely filed an Opposition to that Motion.

On August 28, 2003, the United States District Court for the Northern District of Ohio granted the Motion for Summary Judgment stating that the Petitioner could not meet essential elements of her claims. The Petitioner filed a Notice of Appeal to the

Sixth Circuit Court of Appeals on September 4, 2003. The Sixth Circuit affirmed the District Court's decision on January 31, 2005.

Therefore, the Petitioner files this Writ of Certiorari requesting that this Honorable Court grant writ and review the merits of the case given that the Petitioner's constitutional rights have been violated and that she had met her burden of proof of the claims set forth in her complaint.

REASONS FOR GRANTING PETITION

I. THE DISTRICT COURT OF OHIO AND THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN IMPOSING AN IMPERMISSIBLE BURDEN FOR RETALIATION PURSUANT TO THE STATUTE THAT IS CONTRARY TO OTHER COURTS AND DISMISSING THE PETITIONER'S COMPLAINT THEREBY VIOLATING THE PETITIONER'S RIGHT OF A JURY TRIAL AND HER DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION.

As an introduction, the Petitioner presented sufficient evidence on all the elements of her claim of retaliation to overcome a summary judgment. Further, she presented three salient points that the Respondent's acts were a pretext for retaliation. Thus, given the burden, the Petitioner's claim should have been presented to a trier of fact. By having her case dismissed on summary judgment, once again, the Petitioner was denied due process. The EEOC, the internal policy and procedures and the lower courts failed to protect the Petitioner's interests.

A dismissal ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts may not dismiss a complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). The Petitioner must be given the opportunity to present her case before the jury – no jury has had the opportunity to weigh the evidence of her allegations since the District Court entered judgment based upon the alleged failure to meet the essential elements of retaliation, more specifically adverse action and causation.

The Petitioner's claims are salient since the lower courts imposed no duty upon the Respondent, a government agency, to enforce its own policy regarding retaliation. Instead of complying with the accusation, the Petitioner's supervisors delayed any investigation and failed to follow any mandate by the supervisor's association. The lower courts failed to use the proper standard of review and assess all factual evidence and draw all reasonable inferences in favor of the Petitioner. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 6512, 657 (6th Cir. 2000).

Due to the Respondent's failure to investigate the matter, respond to the Petitioner's complaint of retaliation and follow directives, the Petitioner has been severely prejudiced. To establish a prima facie case of

Title VII retaliation, the employee must establish that she: 1) engaged in protected activity; 2) the exercise of protected rights was known to the employer; 3) the employer thereafter took adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *Hafford v. Seidner*, 183 F.3ed 506, 515 (6th Cir. 1999). Of course, the Petitioner was engaged in her protected activity of the duties of her employment which are controlled by federal policies and procedures. Once the Petitioner complained with the EEOC and then the filing at the district court of a discrimination case, soon thereafter, the Respondent took adverse employment action by changing the terms, work schedules and benefits of her employment. Given the timeline of events, the Petitioner met the causal connection element. At minimum, the Petitioner submitted material facts on each element to overcome a summary judgment.

Immediately after the Petitioner filed a gender discrimination case against the Respondent[2], she received three letters from the Employer's making her working conditions worse (and this was only after she was demoted without cause). The Employer disagreed without explanation to her evidence of the necessity of a leave of absence, the lawsuit, he objected to her documentation as being unacceptable with no explanation; the Employer required the Petitioner to be

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[2] The Supreme Court has recognized that a public employee who alleges that she was not promoted or hired because of race states a viable claim under 42 U.S.C. Section 1983 and that her First Amendment rights have been violated. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.ed.2d 52 (1990); *McClintock v. Eichelberger*, 169 F.3d 812 (1999), cert. denied, __ S.Ct. ___, 68 USLW 3106 (1999).

retrained for a position and level in which she had over seven years experience; there is a strong distinction between accredited career enhancement training and a supervisor's unprecedented mandate for unaccredited retraining directed at only one employee, the Petitioner, the Employer failed to respond to the NAPS representative that the Respondent was violating policy by posting the Petitioner's Tour 3 position; and the Employer placed the Petitioner on leave without pay causing her to lose her benefits. The Respondent continuously ignored the Petitioner's complaints and when she was forced to take further action with the EEOC and district court, the Respondent retaliated against her. There was sufficient evidence of the Respondent's pretext conduct and pattern of behavior to overcome a summary judgment. To place a heavier burden upon the Petitioner is in deviation to applicable law and unconstitutional.

In *United States v. Fausto*, 484 U.S. 439, 98 L.Ed.2d 830, 108 S.Ct. 668 (1988), the Supreme Court stated that Congress intended to provide "an integrated scheme of administrative and judicial review of adverse personnel actions taken against federal employees, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 672.

The Respondent, a federal government agency, violated the Petitioner's due process rights by failing to comply with the investigative and administrative process of a discrimination claim and then a retaliation claim. A government agency violated the legitimate purpose of federal statutes to protect employees.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment

of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial

decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve her substantive right of the opportunity to be heard. If the case is not heard by a jury, then a federal employee must disregard the internal procedural process of a discrimination claim. A government agency must be held at a higher standard - it cannot be allowed to establish mandatory grievance procedures and at the same time hinder the other administrative processes, and more importantly, retaliate against employees, like the Petitioner, who abide by the grievance process. The Respondent and the lower courts have frustrated the very essential purpose of NAPS, EEOC and the judicial system.

Moreover, the Due Process Clause of the Fourteenth Amendment requires that a state prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). In *Mullane*, the Supreme Court stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. The courts failed to protect the Petitioner's property - her government job with benefits that she vested twenty-three years of her life.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied those basic constitutional concepts - the Petitioner was not given a reasonable opportunity to present her case from an arbitrary or unjust appropriation.

Investigations provide due process. *Thomas v. United States*, 47 Fed.Cl. 560 (2000). The Petitioner was entitled to due process in the investigatory stage, not being retaliated against since she complained when her position was wrongfully shuffled and benefits swiped away. *Weaver v. United States*, 46 Fed.Cl. 69 (2000).

To constitute an adverse employment action, an act must result in a loss in pay or benefits, a detrimental change in responsibilities, a negative change in the terms and conditions of employment, or some such actual and unfavorable change in job status. *Birone v. Indian River Sch.*, 1998 US App. LEXIS 7603; *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000). Moreover, citing to the EEOC manual, the *Ray* court specifically stated that an adverse employment action includes "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protect activity." *Ray*, at 1243-1243. Of course, the Petitioner had a change of terms of her employment opportunities that was based on a discriminatory practice in which she filed a complaint with the EEOC and the district court. Only after the case was filed, the Respondent commenced retaliatory acts.

As held in other circuits, an adverse employment action is one that deprives the employee of "employment opportunities, or adversely affects his or her status an employee." *Gupta v. Florida Board of Regents*, 212 F.3d 571, 587 (11th Cir. 2000), *quoting, Robinson v. City of*

Pittsburgh, 120 F.3d 1286, 1300 (3rd Cir. 1997). It may also include harassment of the employee by a supervisor. *Hodoh-Drummond v. Summit County*, 84 F.Supp.2d 874, 885 (N.D. Ohio 2000). A materially adverse change in the terms and conditions of employment can be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Hollins v. Atlantic Company, Inc.*, 188 F.3d 652 (6th Cir. 1999). *See also Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10trh Cir. 1998)(written warnings constitute adverse action); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997) (evidence that employer had "papered" employee's personnel file with negative reports, including two reprimands enough to constitute adverse action); *Berman v. Orkin Exterminating Co.*, 160 F.3d 697, 702 (11th Cir. 1999 (transfer and reduction in territory size is adverse action).

A review of the District Court and Sixth Circuit's opinions demonstrate that they deviated from other circuits and courts. The lower courts heightened the burden for Petitioner to prove an adverse action. Given the above cases, a conflict exists among the circuits and within the Sixth Circuit that needs to be rectified. As this Petition cites, when she complained of her adverse treatment, the Employer retaliated against her. The causal connection element may be established by evidence of circumstances that justify and inference of retaliatory motvie, such as protected conduct followed closely by adverse action. *Kolb v. State of Ohio*, 721 F.Supp. 885, 898 (N.D. Ohio 1989). Courts have also held that the causal connection can be established by showing that the aggrieved employee was treated differently from other

employees. *Moore v. KuKa Welding Systems & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999). Temporal proximity, coupled with a change to a more hostile workplace will satisfy the causal connection requirement. *Taylor v. Runyon*, 175 F.3d 867, 869 (11th Cir. 1999). *See also EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (the Court held that the burden is minimal and that the court must draw reasonable inferences from the evidence).

Given the above standards to prove the causation factor, once again the lower courts deviated from applicable law and placed an unduly and unconstitutional burden upon the Petitioner. Moreover, the Respondent's lack of credible explanation is a pretext for retaliation. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000).

Contrary to the Sixth Circuit's opinion that temporal proximity alone is often insufficient to prove the causal prong of the prima facie case, the Petitioner submitted additional relevant factors, including testimony from other employees that the Respondent was seeking to have her fired without cause and the employment action that was taken affecting benefits and sick leave without a proper SF-50 form completed. The Sixth Circuit failed to look at the totality of the circumstances. Instead, the courts, just like the EEOC, failed to appreciate the pattern of behavior and the Respondent's and EEOC's failure to conduct an investigation. As previously stated, the Respondent failed to respond to the NAPS letter that their acts were in violation of the policy. Nonetheless, these material issues of disputed facts that were to be read in favor of the Petitioner were sufficient to overcome a motion for summary judgment.

While the prima facie case is "a burden easily met," *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir.1987), a plaintiff must provide some evidence beyond temporal proximity to demonstrate a retaliatory causal connection, especially where a defendant provides compelling evidence of alternative causation. The Petitioner met her burden of causation and adverse action.

Therefore, the lower courts violated the Petitioner's due process rights by applying an unreasonable burden of proof that deviated from other circuits and within its own jurisdiction.

The decision is of great public importance whereby a long-term government employee cannot get any form of relief internally, by a public agency or in the judicial process resulting in violations of due process. Furthermore, the Respondent, a government agency, must not be allowed to retaliate against employees who file grievances thereby circumventing the purposel of unions, the EEO and the law.

CONCLUSION

The District of the Northern District of Ohio and the Sixth Circuit Court of Appeals erred in granting summary judgment. Retaliation was a pretext for the Petitioner's valid complaints of unfavorable treatment, change of employment status, and Employer's failure to respond to NAPS directives. The Employer's pattern of behavior to disregard policies and procedures sets forth a damaging precedent not only to other government employees but as well as employers. To place a heavier burden than defined under the statute and common law is unconstitutional and a deviation from due process.

Moreover, an employee, like the Petitioner, should be able to freely have complaints against her employer pursued without suffering further prejudice and being deprived due process. The Respondent, a government agency, should be held at a higher standard to respond to employee's claims, especially those of discrimination and retaliation.

The Court should grant *certiorari* to review this important matter and order that the Petitioner has a constitutional right to pursue her retaliation allegation before a trier of fact.

Respectfully submitted,

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No. 03-4195

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VICKI STEINER,
Plaintiff-Appellant,
v.
WILLIAM J. HENDERSON, Postmaster General,
Defendant-Appellee.

January 31, 2005, Filed

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COUNSEL: For VICKI STEINER, Plaintiff -- Appellant: Elizabeth A. Raies, Tzangas, Plakas, Mannos & Recupero, Canton, OH.

For WILLIAM J. HENDERSON, Postmaster General, Defendant -- Appellee: Lisa H. Johnson, U.S. Attorney's Office, Cleveland, OH.

JUDGES: BEFORE: NELSON and COLE, Circuit Judges, and SARGUS, * District Judge.

OPINIONBY: R. GUY COLE, JR.

OPINION: OPINION

R. GUY COLE, JR., Circuit Judge. Plaintiff-appellant Vicki Steiner claims that her employer, the United States Postal Service ("USPS"), retaliated against her for filing claims of discrimination in federal district court. The alleged retaliatory conduct consisted of USPS posting her permanent position as "open" while she was on a temporary assignment, denying her advanced sick leave, and changing the frequency and nature of medical reporting requirements during her sick leave. The district court found that none of these claims constituted "adverse employment actions" under Title VII, and that even had the actions qualified as "adverse employment actions," Steiner had failed to show sufficiently that the USPS's reasons for taking these actions were related to her filing of EEOC and district court claims. Accordingly, the district court granted summary judgment to the defendants. Because the district court's decision on causation was correct, we AFFIRM the judgment of the district court.

I.

Steiner has been an employee of the USPS since 1979. In 1997, she received a promotion to the position of Manager of Distribution Operations ("MDO") for the weekday afternoon/evening shift.("Tour III") at the Canton, Ohio mail processing plant. In April 1998, Judson Zernechel became the new Canton plant manager, and thus Steiner's supervisor. Over the course of the next two years, Zernechel sent Steiner on several temporary assignments at nearby branch

locations. On October 4, 2000, Zernechel informed Steiner that she was being reassigned to the Canton plant, in the position of MDO, Tour I (midnight -- 8AM shift), "in training." Zernechel claimed that the purpose of the placement was to ensure that Steiner understood how problems occurring on the Tour III shift impacted the Tour I shift. The position of "MDO in training" is not mentioned in any official USPS policy. At the same time, A1 Restivo, who had formerly been an MDO, Tour I, was assigned to Steiner's former MDO, Tour III position.

Upset about her reassignment, Steiner first took several weeks of accrued vacation, and then took sick leave following a diagnosis of panic anxiety related to working the night shift at Canton. In January 2001, she filed a complaint with the EEOC, alleging that her reassignment was due to gender-based discrimination. The complaint was dismissed as untimely by the local EEOC office. The EEOC's finding of untimeliness was later upheld by both the district court and this Court, both of which denied Steiner relief. Steiner v. Henderson, 194 F. Supp. 2d 688 (N.D. Ohio 2002); Steiner v. Henderson, 354 F.3d 432 (6th Cir. 2003).

The complaint in Steiner's prior federal action was served upon USPS on June 4, 2001. Just over two weeks later, Zernechel sent Steiner three letters. The first letter noted that her most recent medical documentation had stated she would return to work by June 18, and that she had failed to submit sufficient documentation for continued sick leave. Steiner claims the letter altered the way she was to report her medical documentation regarding her still-ongoing sick leave, requiring her to report directly to Zernechel every two

weeks, rather than to his office monthly as had previously been the case. *Id.* The second letter informed Steiner that her accrued sick leave was about to expire, and that she would need to apply to Zernechel to get "advance sick leave." The final letter informed Steiner that Restivo was retiring, and that Zernechel was "offering [her] an opportunity to transfer to Tour III as the MDO." The letter also mentioned that Steiner would be required to complete a retraining program prior to returning to Tour III, without mentioning any details of the program.

Steiner claims that she later asked her EEOC counselor (who had previously dismissed her untimely EEOC complaint) to request advanced sick leave from Zernechel, and that the counselor told her that Zernechel had denied her request. Zernechel claims that neither Steiner nor the counselor ever contacted him, and that, if either had, he likely would have granted the request for advanced leave. However, Zernechel stated that since he was not contacted, Steiner was never granted advance sick leave. Since sometime that July (the exact dates are unclear in this regard but are irrelevant to the substance of this appeal), Steiner has thus been on "leave without pay" ("LWOP") status.

On August 2, 2001, Zernechel again sent Steiner a letter noting that she could transfer back to the MDO, Tour III position due to Restivo's retirement. The letter noted that Steiner had not responded to Zernechel's previous letter on the subject, and that failure to respond by August 14 would indicate to him that she was "satisfied with [her] present assignment as the MDO Tour I. . . ." *Id.* On August 6, Steiner's

attorney sent Zernechel a letter stating that there was no need for Steiner to "accept a reassignment" to the MDO, Tour III position, because Steiner had never been formally transferred out of that position, and that "therefore, no response to your offer is necessary."

When the USPS hires someone to do a particular job, that job is noted on a "Form 50" as the employee's "bid position." When an employee is on temporary duty away from her bid position, that job is generally held open. A local union president testified that no bid position is ever supposed to be changed without the consent of the employee. Steiner's attorney thus implicitly claimed in her letter that since Steiner's bid position had never been changed from MDO, Tour III, this was still her permanent position, despite any temporary assignment to Tour I. Despite the letter, and after over a year of Steiner's being on leave, on March 20, 2002, the USPS filled the MDO, Tour III position with another employee.

Steiner then filed another EEOC grievance in the spring of 2002, alleging that Zernechel had retaliated against her for filing her initial EEOC complaint. When the EEOC decided to take no action on her claim, she filed the instant action, claiming retaliatory adverse employment actions under 42 U.S.C. § 2000e-3. The retaliatory actions she alleged were (1) an alteration in her medical documentation requirements, (2) the denial of advanced sick leave, and (3) the posting of her "bid position" as open. The district court granted summary judgment on August 28, 2003, finding both that Steiner had failed to demonstrate an adverse employment action, and that even if she had done so, she had not established a causal connection between the

employment actions at issue and Steiner's filing of her EEOC or district court complaints. This timely appeal followed.

II.

We review district court grants of summary judgment *de novo*. *See, e.g.*, Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 433 (6th Cir. 2003). In order to make a *prima facie* case of Title VII retaliation, a plaintiff must prove: "(1) she engaged in activity protected by Title; VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action." Ford. v. Gen. Motors Co., 305 F.3d 545, 552-53 (6th Cir. 2002).

Neither party disputes that the filing of an anti-discrimination lawsuit is protected activity, nor that USPS knew of the lawsuit at the time that Zernechel sent the three letters at issue. n1 As a result, the only disputes before us regarding the *prima facie* case are whether or not Zernechel's letters constituted adverse employment actions and whether or not Steiner has sufficiently shown a causal connection between the filing of her lawsuit (or service of her complaint upon USPS) and the three letters.

Regarding the causal connection, "a plaintiff is required to proffer evidence sufficient to raise the inference that [plaintiff's] protected activity was [*9] the likely reason for the adverse action. Accordingly, at the *prima facie* stage, the burden is minimal. . . ." EEOC v.

Avery Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997) (quotations and citations omitted).

Steiner claims that "temporal proximity between the protected conduct and the adverse action is sufficient to establish the causal connection." Br. of Appellant at 26 (citing Gribcheck v. Runyon, 245 F.3d.547, 551 (6th Cir. 2001) and Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1337 (11th Cir. 1999)). In support of this statement, Steiner cites one sentence from *Gribcheck*: "Gribcheck showed that his [discrimination-based] litigation was ongoing at the time of his suspension, thereby establishing the fourth prong of his prima facie case." 245 F.3d at 547. However, Steiner's claim as to the state of the law in this Circuit appears to be an incorrect statement of Sixth Circuit law. Numerous Sixth Circuit cases have noted that temporal proximity alone is often insufficient to prove the causal prong of the *prima facie* case. *See, e.g.*, Nguyen v. City of Cleveland, 229 F.3d 559, 565-567 (6th Cir. 2000) ("[Plaintiff] argues that this Circuit follows a rule that temporal proximity between the protected activity and the alleged discriminatory act is alone sufficient to establish a causal connection. . . . [Plaintiff] misstates the law of this Circuit."); Cooper v. City of N. Olmstead, 795 F.2d 1265, 1272 (6th Cir. 1986) ("The mere fact that Cooper was discharged four months after filing a discrimination claim is insufficient to support an interference [sic] of retaliation."); *see also, e.g.*, Moore v. KUKA Welding Sys., 171 F.3d 1073, 1080 (6th Cir. 1999) ("The causal connection . . . may be established by demonstrating that the adverse action was taken shortly after plaintiff filed the complaint *and* by showing that he was treated differently from other employees." (emphasis added)); EEOC v. Avery

Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997) (holding that evidence on causation must be "sufficient to raise the inference that [plaintiff's] protected activity was the likely reason for the adverse action." (quotations and citations omitted)); Harrison v. Metropolitan Gov't of Nashville, 80 F.3d 1107, 1118-19 (6th Cir. 1996) (considering other evidence in conjunction with temporal proximity before finding causation), *abrogated on other grounds as recognized by* Jackson v. Quanex Corp., 191 F.3d 647, 667 n.6 (6th Cir. 1999). *But see* Ford v. Gen. Motors Corp., 305 F.3d 545, 554-55 (6th Cir. 2002) (arguably finding temporal proximity sufficient to show causation, though also arguably considering additional evidence of causation); Gribcheck, 245 F.3d at 551 ("Gribcheck showed that his [discrimination-based] litigation was ongoing at the time of his suspension, thereby establishing the fourth prong of his prima facie case."); Moon v. Transp. Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987) (stating that "proximity in time between protected activity and adverse employment action may give rise to an inference of causal connection," but also noting that "temporal proximity alone will not support an inference in the face of compelling evidence [otherwise.]").

It is well-settled law that a later Sixth Circuit three-judge panel may not overrule an earlier one. *See* Darrah v. City of Oak Park, 255 F.3d 301, 309 (6th Cir. 2001). Thus, to the extent that Steiner claims *Ford*, *Gribcheck*, or any out-of-circuit case held that temporal proximity alone is *always* sufficient to prove this prong, this cannot be the law of this Circuit, in light of *Nguyen* and *Cooper*, among other cases. However, even if one interprets the prior caselaw as holding, in *toto*, that temporal proximity alone can be sufficient to support

such an inference only when there is no compelling evidence to the contrary, *see, e.g.*, Moon, 836 F.2d at 229, Steiner would not prevail here, since USPS has provided compelling alternate causal explanations for the letters' timing.

USPS notes convincingly that the letters were written because Steiner's sick leave was expiring and because Restivo, who had been acting MDO, Tour III, was retiring. As a result, in order to meet the causation prong of the *prima facie* case, Steiner must provide some other evidence, beyond temporal proximity, evincing a causal connection between her anti-discrimination litigation and Zernechel's three letters.

Though Steiner incorrectly claims that temporal proximity is sufficient to show causation, she does attempt to discuss additional evidence. She first claims that other employees were treated differently than she was. *See, e.g.* Moore, 171 F.3d at 1080 (holding that such treatment, including more frequent discipline for trivial infractions and unwarranted criticism of plaintiff's work, when considered in addition to temporal proximity, is sufficient to meet this prong). However, the only disparate treatment she alleges was the fact that she was transferred to Tour I with the "MDO in training" title, where a male employee was transferred to an MDO position at the same time without being labeled "in training." Notwithstanding the fact that Steiner does not show that the male employee was not more qualified than she (and thus not as deserving of training as she was), this action occurred *before* Steiner filed her discrimination complaint. Indeed, this action was the *subject* of her discrimination complaint. As a result, this "different treatment" could not possibly

have resulted from her filing of either the EEOC or district court complaints, since it occurred before those complaints. It thus does not in any way support a finding that Zernechel's adverse actions were motivated by the filing or service of either complaint.

Steiner also complains that no other employees were ever required to undergo retraining before returning from sick leave to an MDO position. However, she does not provide any evidence to support this claim. Even if she had, however, at the time of Zernechel's letter to her, Steiner had been away from all MDO positions (via temporary assignments and then sick leave) for over three years. Steiner did not provide any evidence of any other employees who had been away from their positions for significant portions of time who did not require retraining, nor did she provide any evidence that nothing had changed in the interim or that she was still qualified for the MDO, Tour III position. As a result, Steiner here has not provided any evidence, beyond a mere claim, that other employees were treated differently than she was, nor has she provided any evidence that would tend to show that her retraining was not necessary.

In considering causation, the district court did evaluate some additional evidence provided by Steiner as to Zernechel's and USPS's retaliatory intent. This evidence mostly consisted of statements by co-workers that Zernechel did not like Steiner. However, none of this evidence evinces any sort of retaliatory intent. None of these statements mention Steiner's EEOC or district court filings, nor is the timing of the statements at all clear; indeed some of the statements were certainly made prior to Steiner's filings. *See, e.g.*, J.A.

244-45. As a result, even taking this evidence into account, Steiner has not provided any evidence beyond temporal proximity to show that the actions taken by Zernechel were caused by her EEOC or district court filings. In contrast, USPS has provided reasonable explanations for the letters' timing.

While the *prima facie* case is "a burden easily met," Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987), a plaintiff must provide *some* evidence beyond temporal proximity to demonstrate a retaliatory causal connection, especially where a defendant provides compelling evidence of alternative causation. *See* Nguyen, 229 F.3d at 565-567; Moon, 836 F.2d at 229. Steiner has failed to do so. As a result, she has not met the causality prong of her *prima facie* case with regard to Zernechel's actions in the summer of 2001. Therefore, [*16] we need not determine if the actions in this case qualify as "adverse employment actions."

III.

For the preceding reasons, the summary judgment of the district court is AFFIRMED.

- ---------- Footnotes ----------

* The Honorable Edmund A. Sargus, United States District Judge for the Southern District of Ohio, sitting by designation.

n1 At oral argument, USPS did note that there was no evidence that Zernechel personally knew of the lawsuit at the time he sent the letters. However, since we find that Steiner has not shown causation,

we need not address here whether a *prima facie* case for retaliatory discrimination could be proven if the employer was aware of the protected conduct at issue but the supervisor taking the adverse actions was not.

No. 5:02cv697

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

VICKI STEINER,

Plaintiff,

v.

WILLIAM J. HENDERSON, Postmaster General, United States Postal Service,

Defendant.

8/28/03

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the Motion for Summary Judgment filed on behalf of the Defendant, John E. Potter, Postmaster General United States Postal Service ("USPS" or "the post office") on July 7, 2003 (Dkt. #33), and the Motion to Strike the Affidavit of Tim Bailey and Statement of Robert Prince filed on behalf of the Defendant on August 20, 2003 (Dkt. #37). Plaintiff, Vicki Steiner filed her Opposition Brief on August 5, 2003 (Dkt. #34). USPS filed its Reply Brief on August 20, 2003. The sole claim asserted against the post office is retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended by- the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17 (1994).

USPS, in its motion for summary judgment, contends that Plaintiff cannot demonstrate that she suffered an adverse employment action, nor can she provide evidence of the requisite causal connection between prior EEO protected activity and the alleged retaliatory conduct. Def's S.J. Mo. at p. 2. Furthermore, the post office moves this Court to strike two testimonial exhibits submitted on behalf of Plaintiff because neither witness was disclosed during discovery, and an unsworn statement is not competent evidence to create a genuine issue of material fact on summary judgment. Def's Mo. to Strike at p. 1.

STANDARD OF REVIEW

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56 (c). "Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v Catrett, 477 U.S. 317, 322 (1986).

In considering such a motion, the court must review all of the evidence in the record. See Reeves v. Sanderson Plumbing Prods.. Inc., 530 U.S. 133. 150 (2000) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 587-88 (1986)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts

are jury functions, not those of a judge ... . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); accord Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 556-57 n.7 (6th Cir. 2000). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

"A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of `the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue ofmaterial fact." Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56 (e))- The movant meets this burden "by `showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Clayton v. Meijer Inc., 281 F.3d 605, 609 (6th Cir. 2002) (quoting Celotex, 477 U.S. at 324-25). The non-movant then "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

"The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must `present affirmative evidence in order to defeat a properly supported motion for summary judgment."' Street v. J.C.

Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 250). "A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 250.

FACTS AND PROCEDURAL HISTORY

The following facts are undisputed unless noted otherwise. Plaintiff has been a USPS employee since 1979. Deposition of Vicki Steiner at p. 7. During that time, she has been repeatedly promoted, ultimately attaining the title of "MDO Tour III" in approximately October, 1997. Steiner Dep. at p. 8. - the Management, Distributions Operations position is a supervisory position at level 20. Tour III ("T-3") denotes her scheduled hours, that is, an 8-hour shift beginning at 3:00 p.m. on Monday through Friday. Steiner Dep. at p. 11. According to her supervisor, Plaintiff was never disciplined by the post office, she had no attendance problems, and she enjoyed good evaluations during her tenure with USPS. Zernechel Dep. at pp. 34-35, 101.

Beginning in 1998, Judson Zernechel became Plaintiff's supervisor. Zernechel Dep. at p 19. Although Plaintiff states in her deposition that her relationship with Zernechel was "businesslike" and that he treated her "with civility", she submits the affidavits of her co-workers to demonstrate that Zernechel's public propriety masked a hidden contempt for her. Pl. dep. at pp. 13-4.
According to Plaintiff s Response Brief, "it became apparent that Zernechel disliked Plaintiff. He would blame her for problems in the plant. (Affidavit of

Tim Bailey)

Zernechel stated that he did not want Plaintiff as an MDO. (Affidavit of Bob Prince) He would mock and mimic Plaintiff to other managers when she was not present. (Affidavit of Al Restivo)." Plaintiffs Response Brief at p. l. Plaintiff concludes, "As a result of this animosity, Zernechel sent Plaintiff on several temporary details whereby she physically worked at locations other than her main post at the Canton plant." Plaintiff's Response Brief at p. 1. She also stated at her deposition that while she did not think Zernechel gave her the details as a form of punishment, she believed that it was "his intention to put other people in [her] position." Pl. dep. at p. 102

Zernechel, on the other hand, contends that it was Plaintiff who expressed an interest in becoming a postmaster, and, therefore, he believed she would benefit from the experience of working outside of MDO. Zernechel dep. at p. 36-7. According to Zernechel, Plaintiff did not want to return to MDO after her first detail to Sebring, so he continued to assign her to details in customer service. Zernechel dep. at p. 39. The various details included EXFC Coordinator, AN Coordinator, and OIC (office in charge) detail positions with both the Sebring and Malvern branches Steiner Dep at pp. 12, 18, 25-26, 31-32. Zernechel stated that he thought Plaintiff was interested in a customer service job outside of the Canton Post Office and she sought out the details in order to "help[] her career". Zernechel dep. at p. 39.

Plaintiff admits in her deposition that she "enjoyed the[] detail assignments" Pl.'s Resp. Br. at p. 1.

Moreover, Plaintiff admits that she sought out the first detail in customer service, as a way of "experienc[ing] variety in her career." Pl. dep. at p. 17. She also acknowledges that Zernechel fostered her interest in OIC after she told him that she "had always been interested in experiencing an OTC detail", because OIC duties are generally the same as a postmaster. PI dep. at p. 24. After traveling from one office to another, Plaintiff told Zernechel that she "liked it very much" and that she was "going to bid some positions." Pl. dep. at p. 105. Finally, when questioned whether she told any employees at the Canton Post Office that she was never coming back to the plant following her final detail in Sebring, Plaintiff responded, "I might have said that that this was my opportunity to get into a career of my preference and that if the gods were with me that I would land in a position to do something different, after 20 years of the same thing." Pl. dep. at p. 101-02.

In mid 2000, the Canton Plant experienced a personnel shortage in the MDO position. As a result, Zernechel ended the temporary details of both Plaintiff and Al Restivo, an MDO Tour I ("T-I"). According to Zernechel, he was planning to retire and wanted to prepare the Canton plant for an incoming plant manager, as well as to reduce a cost factor associated with details. Zernechel Dep. at pp. 37-38. Plaintiff, on the other hand, relies on the respective affidavits of her co-workers to establish that, "Zernechel wanted to bring Plaintiff back to the plant so that he could fire her. (Bailey affidavit, Restivo Affidavit)" Pl.'s Resp. Br, at p. 2.

When she returned to the Canton Plant in June, 2000, Zernechel reassigned Plaintiff to the position of MDO "in training" and assigned her to T-1. Zernechel Dep. at pp. 44, 51-52.2 At his deposition, Zernechel stated that he wanted her to witness that "the problems or things that were left undone on [T-3]. how they adversely affected [T-1]" in order to "try to bring [her] skills to a better level." Zernechel dep. at p. 49. Plaintiff, in Zernechel's estimation, "wasn't a complete package" and his intent "was to give [Plaintiff] the exposure to [T-1] that was necessary to have a successful plant. Zernechel Dep. at pp. 44, 51-52.

Restivo, on the other hand, was placed in the T-3 position. Zernechel Dep. at pp. 44--45. Plaintiff underscores the fact that several male MDOs who had been detailed were not given an "in-training" designation. Zernechel Dep. at pp. 116-17. Although Zernechel did not state that Plaintiff's role as T-1 was temporary, he did state at his deposition that he believed that Restivo planned to retire in February, 2001, and that, ultimately, Plaintiff would be restored to the T-3 position at that time

Plaintiff immediately objected to Zernechel's actions, stating that her assignment to T-1 would "turn [her] world upside down", and requested ten days of vacation time in order to "acclimate [her home and children] to the new schedule." Pl. dep. at pp. 45-6 Notably, Plaintiff's children were in their mid-twenties in 2000.

Plaintiff never returned to work. After exhausting all of her vacation time, she began calling off sick because she was suffering from insomnia and panic attacks. Pl

dep. at p. 52fn3.

Plaintiff and Matt Crilly, the local President of the National Association of Postal Supervisors ("NAPS"), both believed the reassignment was breach of USPS policy. As a result, they registered their objections with both Zernechel and his superiors. Crilly Dep. at p. 17. According to Plaintiff, she was offered a meeting with Zernechel and his immediate supervisor, however, she refused to attend the meeting because her attorney was not permitted to be present. Pl. dep. at p. 57. Plaintiff also objected to Zernechel's presence al the meeting as but another violation of USPS policy. Pl. dep. at p. 57.

In January 2001, Plaintiff initiated an EEO charge against the post office for gender discrimination. The matter was eventually dismissed by the EEO office. Plaintiff then filed a complaint in the United States District Court for the Northern District of Ohio arising out of the original EEO charge of gender discrimination. That lawsuit (case number 5:01CV01064) was filed on May 3, 2001. The Defendant was served with the lawsuit on June 4, 2001.fn4

Plaintiffs next contact with Zernechel was in June of 2001, when Zernechel issued three certified letters to her. Pl. dep. at p. 69-70. First, Zernechel informed Plaintiff, by letter dated June 20, 2001, that her medical documentation for the previous month was overdue, and that the documentation she submitted for the period covering April 16, 2001 through June 17, 2001 was unacceptable. He also instructed her that she was now required to report off work directly to him every two weeks, rather than the

standard 30 days.

At her deposition, Plaintiff admitted that she never complied with Zerechel's request regarding her medical documentation, because he never provided an explanation of "what additional documentation was required." Pl. dep. at p. 97. Furthermore, she never complied with his bi-weekly medical report request because she claims that it was in violation of USPS policy. Pl. dep. at p. 98-9. Finally, after she received the letter, she admitted that she did not continue to provide monthly medical reports (as she admitted was required by USPS policy), hecause "[Zernechel] did not ask for that." Pl. dep. at p. 99.

The second letter, also dated June 20, 2001. advised Plaintiff that her sick leave was due to expire and that she would be considered on leave without pay ("LWOP"). Bearing in mind the consequence of LWOP status on her benefits, Zernechel suggested that if Plaintiff was interested in advanced sick leave, she should contact his office. Pl. dep. at p. 70. According to Plaintiff's deposition, she requested advanced sick leave albeit through her EEO counselor in July, 2001. Pl. dep. at p. 73. The EEO counselor informed Plaintiff shortly thereafter that her request had been denied, resulting in LWOP status. Pl. dep. at p. 75.

The third letter, dated June 21, 2001, informed Plaintiff that the T-3 position at issue was vacant due to Restivo's retirement. Pl. dep. at p. 70. Zernechel informed Plaintiff that she should notify him of- her interest in the position in writing by June 29, 2U01 and instructed her that she would be required to complete a re-training program (of

Zernechel's design) in order to qualify for the position. Plaintiff contends that the position was posted on June 22, 2001 in violation of USPS policy. Pl. Opp. Br. at p. 4. After her attorney notified the Defendant that her client need not accept "reassignment" to the vacant T-3 position because she was never officially transferred out of that position, Zernechel sent another letter, dated August 2, 2001, again offering her the opportunity to transfer to T-3.

As s result of the letters and the subsequent denial of her advanced sick leave, Plaintiff filed a second EEO complaint alleging retaliation based upon her prior EEO protected activity. In May, 2002, the EEO Office of the Postal Service dismissed Plaintiff's complaint pursuant to 29 C.F.R. 1614.107(a). The Office of Federal Operation in Washington D.C. reversed the USPS decision and remanded the matter to the agency for further processing. Plaintiff states that the post office failed to comply with that mandate. Pl. Opp. Br. at p, 4.

Plaintiff contends that the Zernechel letters are evidence of retaliation because they each violated USPS policy with respect to bid positions. Pl. dep. at p. 101. Crilly testified as to the procedure for awarding such positions. When a job opening is available, a vacancy announcement is posted showing the days off, tour, work hours and level of pay. Deposition of Matt Crilly at p. 10. Once the position is awarded to an employee, it is considered his/her bid position. Crilly Dep. at p. 11. An employee's bid position is documented by a "Form 50." This form sets forth an employees job title and

"Tour." Crilly Dep. at p. 12. If an employee is on a temporary detail, her bid job is held open. Crilley Dep. at p. 13. According to Crilly, the bid job, including the tour and days off cannot be changed without the permission of the employee. Crilly Dep. at p. 14-15.

Plaintiff's Form 50 designated her as an MDO T-3. Zernechel Dep. at pp. 22, 105--106. Restivo's bid position was an MDO T-1. Restivo Affidavit at 12. The Defendant's policy mandates that if a person's position is changed, due to bidding and being awarded another position, the Form 50 must reflect that change. Zernechel Dep. at p. 24. The Defendant's policy also mandates that all vacancy announcements must list the tour of duty, hours of work, workweek and non-scheduled days. Zernechel Dep. at p 114. Zernechel admits that Plaintiff's Form 50 was never changed. Zernechel Dep. at p. 37.

Following the dismissal of Plaintiff's second EEO complaint, she filed the above -captioned action. Plaintiff contends that as a result of Zernechel's retaliatory actions, she has lost her wages and benefits, and suffers from severe anxiety.

In order to establish a prima facie case of retaliation under Title VII, Plaintiff must prove that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant, (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and

the adverse employment action or harassment. Morris v. Oldham County Fiscal Court. 201 F.3d 784, 792 (6th Cir.2000) (emphasis omitted).

Once the plaintiff establishes a prima facie case, the burden of production of evidence shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. id. at 792-93 (quoting McDonnell Douglas Corp. v. Green. 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

The plaintiff must then demonstrate that the employer's proffered reason was not the true reason for the employment decision. Id. at 793, 93 S.Ct. 1817 (quoting Texas Dep't of Cmty. Affairs v. Burdine. 450 U.S. 248, 256 (1981)). "A plaintiff can demonstrate pretext by showing that the proffered reason (l) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." Hopson v. DaimlerChrysler Corp., 306 F.3d 427,434 (6th Cir 2002) (quoting Dews v. A.B. Dick Co.. 231 F.3d 1016, 1021 (6th Cir.2000) (internal citation and quotation marks omitted)). The plaintiff bears the burden of persuasion throughout the entire process. Id.

As an initial matter, it is important to note that Zernechel's decision to assign Plaintiff to an MDU T-1 position in June, 2000 is not the proper subject of this lawsuit.

Insofar as Plaintiff contends that Zernechel acted in retaliation for Plaintiff's protected EEO activity, the Court cannot consider her reassignment to T-1, as that occurred prior to any protected activity in this

case. The same is true for Zernechel's decision to detail the Plaintiff to the branch post offices. Consequently, Plaintiff must rely exclusively on the Zernechel letters and the denial of her advanced-sick leave to demonstrate that she suffered an adverse employment action in order to establish the second element of her prima facie case.

An adverse employment action was defined by the Sixth Circuit in Hollins v. Atlantic Co., 188 F.3d 652 (6th Cir.1999):

[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Id. at 662 (quoting Crady v. Liberty Nat'l Bank &Trust Co. of Ind. 993 F.2d 132,136 (7th Cir. 1993)). De minimus employment actions are not materially adverse employment actions. Bowman v. Shawnee State Univ. 220 F.3d 456, 462 (6th Cir.2000). For instance, "[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions." Policastro v. Northwest Airlines, 297 F.3d 535, 539 (6th Cir.2002).

Plaintiff argues that she lost her advanced sick leave

and ultimately her job, and, therefore, she has suffered an "adverse employment action," as that term is defined by Title VII. Plaintiff admits, however, that she never requested advanced sick leave from Zernechel. Plaintiff, instead, relied on her EEO counselor to request advanced leave. Furthermore, the ultimate loss of the T-3 position was the result of Plaintiffs refusal to undergo retraining by Zernechel. As a matter of fact, she was given two opportunities to return to the T-3 position by Zernechel following Restivo's retirement. Insofar as Plaintiff relinquished by inaction both her advanced sick leave as well as the T-3 position, the Court finds that she has not demonstrated that the post office "took an adverse employment action against [her]." Morris 201 F.3d at 792.

Moreover, assuming arguendo that Plaintiff has suffered an adverse employment action, this Court finds that she cannot demonstrate the requisite causal connection between her prior EEO protected activity and the alleged retaliatory conduct. Plaintiff relies exclusively upon the temporal proximity of her EEO activity and the Zernechel letters to establish the causal connection necessary to demonstrate a prima facie case of retaliation. Plaintiff cites Cribcheck v. Runyon, 245 F.3d 547(6th Cir. 2001), for the propostion that temporal proximity between protected conduct and the adverse action is sufficient to establish the causal connection. Id. at p. 551.

However, Plaintiff then proceeds to establish that, although she filed her first district court complaint in June, 2001, shortly before she received the

Zernechel letters, her protected conduct actually began in October, 2000 when she objected to the T-1 re-assignment, and sought the intervention of Zernechel's superiors in an effort to return to the T-3 position. Pl. Opp. Br. at pp. 5-6.

Plaintiff is absolutely correct that, according to the Sixth Circuit, her protected activity began in October, 2000. See Johnson v. University of Cincinnati, 215 F. 3d 561, 578 (6th Cir.2000)(protected activity can include advocacy against an employer's discriminatory practices). However, this fact cuts against her temporal proximity argument. Although the Zernechel letters were sent only a few days after she filed her complaint in district court, they were sent eight months after the initiation of Plaintiff's protected EEO activity. Furthermore, the timing of the Zernechel letters is obviously related to the exhaustion of Plaintiffs paid leave and Restivo's retirement, rather than Plaintiffs protected activity. Consequently, Plaintiff has failed to establish the requisite "temporal proximity".

Moreover, while the Court has acknowledged that it may not consider Zernechel's decisions to detail Plaintiff and to reassign her to T-1 in June, 2000 as evidence of retaliation, the Court may consider this evidence in order to determine Zernechel's motivation for the allegedly retaliatory conduct at issue. Plaintiff has attested to the fact that she believes she was detailed because it was Zernechel's intention "to put other people in [her] position." Pl. dep. at p. 102. However, Plaintiff admits it was her job performance as an MDO that prompted Zernechel to detail her to branch post offices Pl. dep. at p. 103.

("[H]e was not satisfied overall with my performance").

Plaintiff has further submitted the affidavits of co-workers in order to document Zernechel's ill will toward her.fn5 However, "[p]ersonal conflict does not equate with discriminatory animus." Barnett v. Dept of Veterans Affairs, 153 F. 3d 388, 342-43 (6th Cir.1998), cert. denied 119 S.Ct. 825 (1999)(upholding a district court's determination that witness's statements describing how supervisor made it known that "he disliked the plaintiff and used her as the butt of office jokes, are consistent with personal dislike rather than discriminatory animus").

In other words, assuming the admissibility of her co-workers statements, those statements do not demonstrate actionable discriminatory animus. As the Supreme Court held in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), in Title VII actions, it is important to distinguish between harassment and discriminatory harassment in order to "ensure that Title VII does not become a general civility code." Id at p. 788. The same rationale applies to Title VII retaliation claims, which should not be sustained in the face of hostile treatment that cannot be connected to retaliatory intent.

There is quite frankly no evidence before the Court to create a genuine issue of material fact as to whether the letters at issue were sent in retaliation for Plaintiff's protected activity. In fact, all of the evidence before the Court indicates that Zernechel acted on the belief that Plaintiff was not an efficient or effective MDO or that he simply did not like her. However, neither explanation is grounds for a

retaliation claim under Title VII.

Therefore, Plaintiff cannot establish that Zernechel's post-October, 2000 conduct was retaliation "rather than simple belligerence", see Richmond-Hopes v. City of Cleveland, 168 F.3d 490 (6th Cir. 1998), and, therefore, Plaintiff has failed to establish a causal connection between her protected activity and the Zernechel letters and denial of her advanced sick leave.

In conclusion, Plaintiff, having failed to demonstrate that she suffered an adverse employment action or establish any causal connection between Zernechel's conduct and her EEO activity, cannot demonstrate a prima facie case of retaliation under Title VII. Accordingly, the Defendant's Motion for Summary Judgment is GRANTED and its Motion to Strike is MOOT.

Footnotes

fn1John E. Potter is automatically substituted for former Postmaster General William J. Henderson pursuant to Fed. R. Civ. P. 25(d).

fn2Zernechel admits that he is aware of no one else in the USPS that has the designation of MDO "in training." According to the Restivo affidavit, the designation does not exist. Restivo Aff. at Par. 5. However, according to Bailey, postal supervisors often required problem employees to complete a retraining program as the first step in the disciplinary process. If the employee did not perform following the retraining, termination proceedings were begun. Bailey Aff. at

Par. 7.

fn3Although Plaintiff was being paid during the over one thousand hours of sick leave which she exhausted and her additional annual leave, her medical benefits were terminated in August 2002. Pl. dep. at pp. 59, 65.
fn4On March 28, 2002, the Honorable Dan Aaron Polster dismissed the district court complaint based upon Plaintiff's failure to timely exhaust her administrative remedies, as she had not contacted an EEO counselor within 45 days of the alleged discriminatory action. In the same Memorandum Opinion and Order, Judge Polster denied Plaintiffs motion to amend her complaint to include a Title VII claim based upon retaliation. Steiner v. Henderson, 5:01 CV 1064.

fn5Although the admissibility of the Bailey and Prince submissions are the issue of the pending motion to strike, the Restivo affidavit has not been challenged. Restivo states in his affidavit that he believes that the "in training" designation was "intended as an insult by [Zernechel]." Affidivit of Al Restivo at Par. 6. He further states that "[Zernechel] disliked [Plaintiff] for challenging his authority" and that [Zernechel] was "unhappy when [Plaintiff] did not immediately come back to the Canton Plant on his terms." Restivo Aff. at 118. Finally, Restivo states that he "had observed [Zernechel] mock an mimic [Plaintiff] in front of various other managers at the Canton Post Office" because Zernechel "had a problem with [Plaintiff]." Restivo Aff. at Par. 8.